No. 15227

In the United States Court of Appeals for the Ninth Circuit

ERNEST MATEO, JOSEPH OKU, JOSEPH K. NAKILA, JOSEPH ACELLO, WADE H. REDMON, HARRY L. PERRY, HERMAN K. KAPULE, KENTON AICHELE, WILLIAM T. AHIA, AND JAMES B. JAY, ON BEHALF OF THEMSELVES AND ON BEHALF OF OTHER EMPLOYEES OF THE DEFENDANTS SIMILARLY SITUATED, APPELLANTS

v.

AUTO RENTAL COMPANY, LTD., AND THACKER TRANSPORTATION CO., LTD., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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STATEMENT OF THE CASE

The Secretary of Labor, United States Department of Labor, by virtue of Reorganization Plan No. 6 of 1950 (15 F. R. 3174), 64 Stat. 1263, 5 U. S. C. 133z–15, effective May 24, 1950, is responsible for the duties theretofore vested in the Administrator of the Wage and Hour Division by the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. Sec. 201 *et seq.*).

This appeal presents an important question concerning the application of the Act's "in commerce" phase of coverage. Therefore, the Secretary of Labor respectfully submits this brief as *amicus curiae.*

This is an action under Section 16 (b) of the Act for the recovery of unpaid overtime compensation and attorneys' fees. It was filed by certain of appellees' employees, known as "airporter" drivers. During the period for which these drivers seek recovery, they were engaged in transporting airline and steamship passengers (arriving from or leaving for points outside the Territory of Hawaii) between the Honolulu International Airport or the Port of Honolulu, as the case may be, and the business and Waikiki hotel districts of Honolulu. The pleadings raised a number of questions, but by agreement of the trial court and the parties the basic question of whether the "airporter" drivers were within the general coverage of the Act, was tried first. On this question, the trial court held that the drivers were engaged in "local," not interstate, commerce and, therefore, not within the coverage of the Act (R. 141).

ARGUMENT

Employees engaged in furnishing integrated connecting transportation for travelers and property on interstate trips, are engaged "in commerce" within the meaning of the Fair Labor Standards Act

Although the decision of the Fourth Circuit in *Airlines Transp.* v. *Tobin,* 198 F. 2d 249 (C. A. 4, 1952), passed on the precise coverage question here presented and, as we shall show is plainly a correct ap-

plication of the principles which the Supreme Court has established for determining coverage under this and similar Acts, the court below chose to rely upon the district court decision rendered five years earlier in the case of *Cederblade* v. *Parmelee Transportation Co.,* 94 F. Supp. 965 (N. D. Ill., 1947),[1] affirmed on other grounds, 166 F. 2d 554 (C. A. 7).

The intervening time between the *Cederblade* decision and the Fourth Circuit's decision is highly significant, because in that interval the Supreme Court handed down its second decision in *United States* v. *Capital Transit Co.,* 338 U. S. 286 (November 14, 1949),[2] rehearing denied, 338 U. S. 901, which contradicted the basic reasoning on which the *Cederblade* decision was premised. The *Cederblade* decision rested solely on the portion of the Supreme Court's decision in *United States* v. *Yellow Cab Co.,* 332 U. S. 218, which ruled that "when local taxicabs merely convey interstate train passengers between their homes and the railroad station *in the normal course of their independent local service*" (*Id.,* at 233; emphasis added), they were not engaged in interstate commerce within the meaning of the Sherman Act. As the district court noted in the *Cederblade* opinion, the Supreme Court, in the same *Yellow Cab* decision,

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[1] The only question presented on appeal of the *Cederblade* case apparently related to the transportation between railroad depots, which the appellate court held to be exempt under Section 13 (b) (1) as part of the railroad transportation. Nothing was said in appellate opinion about the airport transportation.

[2] Reaffirming *United States* v. *Capital Transit Co.*, 325 U. S. 357, rehearing denied 325 U. S. 896.

had drawn a distinction between such transportation which was "only casual and incidental" to a general local taxicab service, and the Parmelee Company's inter-station transportation which was performed pursuant to contractual arrangement with the main interstate carrier, the Parmelee Company's transportation being specifically held "an integral step in the interstate movement." With respect to the Parmelee Company's operations, the Supreme Court said:

> When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball,* 10 Wall. 557, 565. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. [332 U. S. at 228–229.]

However, the *Cederblade* decision construed this ruling as being limited to the interstate transportation of travelers *already in the midst of an interstate trip,* while broadly interpreting the "local taxicab" portion of the *Yellow Cab* decision to mean that "hauling [of] passengers to and from stations and terminals, * * * *preceding or following* the interstate journey" is local and not interstate, regardless of any contractual or special connection with the main interstate carrier (*Id.* at 969). That this was an erroneous interpretation of the "local taxicab"

ruling was made clear beyond doubt in the Supreme Court's subsequent decision in the *Capital Transit* case, *supra*. The Court there specifically rejected the argument that its *Yellow Cab* ruling with respect to local taxicabs applied to transportation of passengers by District of Columbia bus and trolley lines to stops within the District where the passengers boarded busses to nearby Virginia, and reaffirmed its holding in the earlier *Capital Transit* case (325 U. S. 357, rehearing denied, 325 U. S. 896) that such transportation is in interstate commerce.[3]

Thus the Fourth Circuit, in deciding the *Airlines Transportation* case, had the benefit of the second *Capital Transit* decision while the district court in *Cederblade* did not. Had the district court been aware of this clear-cut Supreme Court decision on the limited application of its "local taxicab" ruling, we venture to say that it would have reached the same result as the Fourth Circuit did in the *Airlines Transportation* case. For the court in *Cederblade* expressly recognized that "airport bus operations cannot with complete consistency be regarded as local taxicab operations" (94 F. Supp. at 969).

The "airporter" ground transportation here furnished passengers directly and immediately to or from their interstate trips is plainly as much "an integral

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[3] Indeed, in the *Yellow Cab* opinion itself, the Court directed attention to the limited situation it was ruling upon: "All that we hold here is that when local taxicabs *merely* convey interstate train passengers between their homes and the railroad station *in the normal course of their independent local service*, that service is not an integral part of interstate transportation" (332 U. S. at 233). [Emphasis added.]

step in the interstate movement'' of passengers as was the Parmelee Company's service to passengers to and from railroad stations in the *Yellow Cab* case, and much more so than was the Transit Company's service to Virginia-bound passengers in the *Capital Transit* case. Plainly appellees' ''airporter'' drivers are not transporting these passengers merely as an incident to a general local transportation service. Not only is this transportation service performed pursuant to a contractural arrangement between the airlines and appellees, but much of it is booked and paid for by the passengers when they purchase their airline tickets. Indeed, over half of appellee's ground transportation is prebooked or ''coupon'' (prepaid) business (R. 52, 105–106). In this important respect, the instant case is not only stronger than the *Airlines Transportation* case, but it is plainly distinguishable from the *Cederblade* case for, as there pointed out, the air passengers paid the ground carrier direct for the ground portion of their journey (see 94 F. Supp. at 962). Here, as the undisputed evidence shows, a substantial number of passengers pay *direct to airlines* or travel agencies and are thereupon issued coupons for the ground portion of their journey (R. 96–97). These coupons are handed to appellees' drivers by the passengers when they arrive at the airport and transfer from the airplane to the waiting ''airporter'' bus. The drivers turn the coupons in to appellees who then bill the issuing airline or travel agency, neither of whom remits the entire amount since they are entitled to retain 10 percent (R. 107–8).

Not only is it clear that the *Airlines Transportation* decision, rather than the *Cederblade* decision, correctly construed the Supreme Court's *Yellow Cab* and *Capital Transit* decisions, but the decision reached in the *Airlines Transportation* case plainly accords with the principles of the Supreme Court's decisions construing the "in commerce" coverage of the Fair Labor Standards Act.

The most pertinent of the Supreme Court's many decisions under this Act is *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564. The problem there was whether transportation from the warehouse of a wholesaler to its selling outlets in the same State was local or a continuation of the interstate movement of the goods into the warehouse. The Supreme Court held that if the ultimate destination of goods in another State is known at the time they begin their movement in the State of origin, as where they are obtained for a particular customer "pursuant to a prior order, contract, or understanding" with him, the goods remain "in commerce" until they reach that customer, notwithstanding a "break in their physical continuity of transit" and "a temporary holding of the goods" at a warehouse after arrival in the State of destination (317 U. S. at 569).[4]

[4] While the *Jacksonville Paper* case dealt with the end of the movement, whereas the instant case is concerned with the beginning as well as the end, the same principles are equally applicable where there is the requisite "practical continuity of movement." See *Stewart-Jordon Distributing Co.* v. *Tobin*, 210 F. 2d 427 (C. A. 5), certiorari denied, 347 U. S. 1013; *Rockton & Rion Railroad* v. *Walling*, 146 F. 2d 111 (C. A. 4), certiorari denied, 324 U. S. 880; *Republic Pictures Corporation* v. *Kappler*, 151

The principles of the *Jacksonville Paper* case, we submit, apply with even greater force here. As appellees' own witness testified, 70 percent of the travelers who fly to Honolulu from the mainland have definite hotel reservations while 30 percent of them also have a "prebooked or prepaid transfer" from the airport to their respective hotels (R. 101–103).[5] These passengers have not arrived at their predetermined destinations when they deplane at the airport; they have only completed the air portion of their journey. This is also true of the other incoming passengers, i. e., those without hotel reservations in Honolulu. Airports of necessity are located at a substantial distance from the cities which they serve, as the Fourth Circuit pointed out in the *Airlines Transportation* case (198 F. 2d at 251), and passengers ordinarily have no business in them other than commencing or completing the air portion of their journey. For this reason, too, it is equally plain that passengers with airline reservations to the main-

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F. 2d 543 (C. A. 8), affirmed, 327 U. S. 757, rehearing denied, 327 U. S. 817. The coverage question in *Stewart-Jordan* concerned driver-helpers of an intrastate beer distributor whose duties consisted of picking up "empties" and transporting them from the customers' establishments to the distributor's warehouse where they were checked, sorted and then loaded into railroad cars for shipment to out-of-State breweries. The Fifth Circuit, on the ground that the Supreme Court's *Jacksonville Paper* decision was "controlling" (210 F. 2d at 431), affirmed the trial court's holding that the interstate shipment of the "empties" *began* when the "empties" were picked up by the driver-helpers and continued through the warehouse to the railroad car and to the ultimate destination of such "empties" at the out-of-State breweries.

[5] These percentages also apply to steamship passengers (R. 102, 103).

land or to other points outside the Territory of Hawaii have fixed interstate destinations at the time appellees' transportation from Honolulu to the airport is *begun.*

In the *Jacksonville Paper* case, the Supreme Court held that "The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act" (317 U. S. at 568). It is even clearer that the interstate journey has not been terminated, if indeed even interrupted, by the transfer of passengers directly from an airplane into a waiting limousine which immediately transports them the remaining miles to the city of their destination. And plainly transportation by limousine for the sole and special purpose of enplaning for a predetermined interstate destination is no less an integral part of a continuous interstate journey.

"Practical continuity in transit" was held in the *Jacksonville Paper* case to be the condition "necessary to keep a movement of goods 'in commerce' within the meaning of the Act." Furnishing this "practical continuity in transit" is the reason for the contractual arrangements between appellees and the airlines. Casual service is given by taxicabs and other carriers (R. 87–88), but appellees are required to, and do, give *connecting* service. The schedules of their "airporter" busses are tied in with the schedules of the airlines (R. 47, 63, 120, 123). Even when airplanes turn back after taking off because of engine difficulties, appellees are notified so that they can reschedule their service to take care of the passengers

and the crew during the "lay-over" (R. 63–64). This "practical continuity in transit" benefits not only the passengers but also the airlines by facilitating "the expedition of their own airline business with respect to prompt arrivals and departures in maintaining schedules" (*Cf.* opinion below, R. 140).

The *Jacksonville Paper* case also makes it clear that the failure of Congress, when it passed the Act, to use its full power under the Commerce Clause, is no reason for giving the phrase "engaged in commerce" a "restricted meaning" (*Cf.* opinion below, R. 139). For it was there held (317 U. S. 564, 567) "that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce. There is no indication (apart from the exemptions contained in Sec. 13) that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended." As stated by the Supreme Court in *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, at 128:

> Respondent contends that petitioners are in this category, that their activities are local and at most only affect commerce. But the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase "engaged in commerce." We said in the *Jacksonville Paper Co.* case, *supra,* "It is clear that the purpose of the Act was to extend federal control

in this field throughout the farthest reaches of the channels of interstate commerce."[6]

CONCLUSION

The holding below on the coverage issue should be reversed.

Respectfully submitted.

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OCTOBER 1956.

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[6] The Fair Labor Standards Amendments of 1949 (Act of October 26, 1949, c. 736, 63 Stat. 910, 29 U. S. C., Supp. IV, sec. 201) left intact the broad scope of coverage under the original definition of "commerce" in Section 3 (b). The only modification in the definition of "commerce," was a slight change to expand to some extent the group covered under the former definition. The definition of "commerce" previously referred to commerce "from any State to any place outside thereof." The Amendment simply substituted "between any State and any place outside thereof."

U. S. GOVERNMENT PRINTING OFFICE: 1956